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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re A.P., a Person Coming Under the Juvenile  
Court Law.

KERN COUNTY DEPARTMENT OF HUMAN  
SERVICES,

Plaintiff and Respondent,

v.

H.R. et al.,

Defendants and Appellants.

F085706

(Super. Ct. No. JD143424-00)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Kern County. Christie Canales  
Norris, Judge.

Beth A. Sears, under appointment by the Court of Appeal, for Defendant and  
Appellant, H.R.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and  
Appellant, R.T.

Margo A. Raison, County Counsel, and Alexandria M. Ottoman, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Hill, P. J., Levy, J. and DeSantos, J.

Appellants H.R. (father) and R.T. (mother) are the parents of A.P. (the child), who is the subject of this dependency case. Both parents challenge the juvenile court's order issued at a Welfare and Institutions Code section 366.26<sup>1</sup> hearing that resulted in their parental rights being terminated. Mother and father contend the juvenile court and the Kern County Department of Human Services (department) failed to comply with their duty of inquiry under the Indian Child Welfare Act (ICWA). The department concedes that it failed to conduct an adequate inquiry into the potential Indian ancestry of the child's father, and it does not oppose remand for the limited purpose of conducting further ICWA inquiry. We agree with the parties and conditionally reverse the juvenile court's order terminating parental rights and remand for proceedings to ensure ICWA compliance.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

In June 2022, the department filed a juvenile dependency petition alleging the child was described by section 300, subdivisions (b) and (j). The allegations involved mother's unresolved substance abuse problem and use of methamphetamine during her pregnancy with the child. The petition further alleged that mother previously lost custody of the child's half sibling through a dependency proceeding due to her substance abuse and mental illness. Mother initially identified her boyfriend as the child's alleged father, and she denied having any Indian ancestry.

At a continued detention hearing held on June 8, 2022, mother and her boyfriend were not present. The child was detained from mother's custody and a combined jurisdiction and disposition hearing was set for July 28, 2022. The juvenile court found ICWA was not applicable as to mother based upon her denial of Indian ancestry to the department. The department's jurisdiction report recommended that the allegations of the

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<sup>1</sup> All further undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> The sole issue on appeal concerns ICWA; therefore, we primarily restrict our facts to those bearing on that issue.

original petition be found true. At the July 28, 2022 hearing, mother failed to appear, and the juvenile court found the allegations to be true. The dispositional hearing was continued to August 26, 2022.

The disposition report recommended that the child remain in out-of-home care and reunification services not be provided to mother pursuant to section 361.5, subdivision (b)(10). Genetic testing excluded mother's boyfriend as the biological father of the child. The child's maternal grandparents, maternal cousin, and maternal great-aunt all denied having any Indian ancestry. The social worker's attempts to reach five other maternal relatives were documented as unsuccessful.

At the dispositional hearing held on August 26, 2022, mother was not present. The juvenile court ordered that mother not be provided family reunification services pursuant to section 361.5, subdivision (b)(10), and it set a section 366.26 hearing for December 16, 2022. On October 31, 2022, an ex parte hearing was held after father came forward and requested a paternity test. The juvenile court ordered paternity testing, and the results indicated father was the child's biological father.

The department's section 366.26 report, dated December 5, 2022, recommended that the juvenile court terminate the parental rights of mother and father and order a permanent plan of adoption for the child. The child was placed in a resource family home, and the care providers were committed to providing a plan of adoption for the child.

A supplemental report, dated January 17, 2023, detailed the social worker's conversations with father's family regarding placement of the child and potential Indian ancestry. The child's paternal step grandmother denied having any Indian ancestry, and the paternal aunt was uncertain of Indian ancestry in the family. The paternal aunt indicated she would have to speak to the paternal grandmother for information about their ancestry. Attempts to contact paternal uncles and other paternal nonrelative extended family members were unsuccessful.

At a continued section 366.26 hearing held on January 19, 2023, father appeared and denied having any knowledge of Indian ancestry in his family. The maternal grandmother was also present at the hearing, but the juvenile court did not inquire of her regarding Indian ancestry. The juvenile court once again found that ICWA was not applicable to the child. Father filed a section 388 petition requesting family reunification services, which was set to coincide with a continued section 366.26 hearing on February 1, 2023. Another supplemental report prepared by the department set forth its opposition to father's section 388 petition. A paternal cousin and nonrelative extended family member each denied having Indian ancestry.

Mother and father were both present for the combined hearing on father's section 388 petition and section 366.26 hearing held on February 1, 2023. After hearing testimony from father regarding his section 388 petition, the juvenile court denied the petition based upon an insufficient showing of best interest for the child. The juvenile court then followed the department's recommendation and terminated the parental rights of mother and father and selected a plan of adoption.

### **DISCUSSION**

Father contends the juvenile court and department failed to adequately discharge their duty of initial inquiry by failing to inquire of the child's paternal grandmother regarding possible Indian ancestry. Mother joins in this argument. The department concedes this point, and we accept their concession.

#### ***A. Applicable Law***

ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards that a state court, except in emergencies, must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7–8.) In any “proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe ... have a right to intervene” (25 U.S.C. § 1911(c)), and may petition the court to

invalidate any foster care placement of an Indian child made in violation of ICWA (25 U.S.C. § 1914; see § 224, subd. (e)). An “ ‘Indian child’ ” is defined in ICWA as an unmarried individual under 18 years of age who is either (1) a member of a federally recognized Indian tribe, or (2) is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. (25 U.S.C. § 1903(4) & (8); see § 224.1, subd. (a) [adopting federal definitions].)

In every dependency proceeding, the agency and the juvenile court have an “affirmative and continuing duty to inquire whether a child is or may be an Indian child ....” (Cal. Rules of Court, rule 5.481(a);<sup>3</sup> see § 224.2, subd. (a); *In re W.B.* (2012) 55 Cal.4th 30, 53; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165.) The continuing duty to inquire whether a child is or may be an Indian child “can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice.” (*In re D.F.* (2020) 55 Cal.App.5th 558, 566.)

The initial duty to inquire arises at the referral stage when the reporting party is asked whether it has “any information that the child may be an Indian child.” (§ 224.2, subd. (a).) Once a child is received into temporary custody, the initial duty to inquire includes asking the child, parents, legal guardian, extended family members, and others who have an interest in the child whether the child is, or may be, an Indian child. (§§ 224.2, subd. (b), 306, subd. (b).) The juvenile court has a duty at the first appearance of each parent to ask whether he or she “knows or has reason to know that the child is an Indian child.” (§ 224.2, subd. (c).) The court must also require each parent to complete form ICWA-020. (Rule 5.481(a)(2)(C).)

Next, a duty of further inquiry arises when the agency or the juvenile court has “reason to believe” the proceedings involve an Indian child but “does not have sufficient information to determine that there is reason to know that the child is an Indian child.” (§ 224.2, subd. (e).) As recently clarified by the Legislature, a “reason to believe” exists

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<sup>3</sup> All further references to rules are to the California Rules of Court.

when the juvenile court or agency “has information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe.” (*Id.*, subd. (e)(1).)

If there is a reason to believe an Indian child is involved, the juvenile court or the agency “shall make further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable.” (§ 224.2, subd. (e).) Further inquiry includes, but is not limited to, “[i]nterviewing the parents, Indian custodian, and extended family members,” and contacting the Bureau of Indian Affairs, the State Department of Social Services, and the tribes and any other person who may have information. (§ 224.2, subd. (e)(2)(A)–(C).)

The final duty component arises when the court or agency has “ ‘reason to know’ ” the child is an Indian child. (*In re D.F.*, *supra*, 55 Cal.App.5th at p. 567.) A “reason to know” exists if one of the following circumstances is present: “(1) A person having an interest in the child ... informs the court that the child is an Indian child[;] [¶] (2) The residence ... of the child [or] the child’s parents ... is on a reservation or in an Alaska Native village[;] [¶] (3) Any participant in the proceeding ... informs the court that it has discovered information indicating that the child is an Indian child[;] [¶] (4) The child ... gives the court reason to know that the child is an Indian child[;] [¶] (5) The court is informed that the child is or has been a ward of a tribal court[; or] [¶] (6) The court is informed that either parent or the child possess[es] an identification card indicating membership or citizenship in an Indian tribe.” (§ 224.2, subd. (d)(1)–(6).)

If the juvenile court makes a finding that proper and adequate further inquiry and due diligence have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that the ICWA does not apply, subject to reversal if the court subsequently receives information providing reason to believe the child is an Indian child. If the court receives such information, it must direct the social worker or probation officer to conduct further inquiry. (§ 224.2, subd. (i)(2).)

### ***B. Standard of Review***

Where the juvenile court finds ICWA does not apply to a child after completion of an initial inquiry, “[t]he finding implies that ... social workers and the court did not know or have a reason to know the children were Indian children and that social workers had fulfilled their duty of inquiry.” (*In re Austin J.* (2020) 47 Cal.App.5th 870, 885.) We review the court’s ICWA findings for substantial evidence. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.) We must uphold the court’s orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance. (*In re Alexzander C.* (2017) 18 Cal.App.5th 438, 446.) The appellant “has the burden to show that the evidence was not sufficient to support the findings and orders.” (*Ibid.*)

### ***C. Analysis***

Pursuant to its duty under section 224.2, the department asked each parent whether they had any Indian heritage. The child’s mother and father both denied having any knowledge of Indian ancestry in their family. The child’s paternal aunt was unsure of their family’s ancestry, and she identified the paternal grandmother as a person who would have knowledge of the family’s ancestry. Based upon this information, the juvenile court found ICWA was not applicable. However, the department was required under section 224.2, subdivision (b) to ask available extended family members about the child’s possible Indian ancestry.

Extended family members include adults who are the child’s stepparents, grandparents, siblings, brothers- or sisters-in-law, aunts, uncles, nieces, nephews, and first or second cousins. (25 U.S.C. § 1903(2); § 224.1, subd. (c).) The department either failed to ask the paternal grandmother about Indian ancestry or did not document it.

Under the circumstances, we conclude the agency did not fulfill its statutory duty of inquiry. (§ 224.2, subd. (b).) As a result, the juvenile court’s finding that ICWA did not apply was not supported by substantial evidence that the department conducted an adequate, proper, and duly diligent inquiry, and its contrary conclusion was an abuse of

discretion. Because the failure in this case concerned the department’s duty of initial inquiry, only state law is involved. “Where a violation is of only state law, we may not reverse unless we find that the error was prejudicial. (Cal. Const., art. VI, § 13 [‘No judgment shall be set aside ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice’].)” (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 742.)

“ ‘[T]o be entitled to relief on appeal from an alleged abuse of discretion, it must clearly appear the resulting injury is sufficiently grave to manifest a miscarriage of justice’ [citations], and California law generally interprets its constitutional miscarriage of justice requirement ‘as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error.’ ” (*In re K.H.* (2022) 84 Cal.App.5th 566, 606–607 (*K.H.*).)

However, in *In re A.R.* (2021) 11 Cal.5th 234, the Supreme Court “recognized that while we generally apply a *Watson*<sup>[4]</sup> likelihood-of-success test to assess prejudice, a merits-based outcome-focused test is not always appropriate because it cannot always adequately measure the relevant harm. [Citation.] In other words, where the injury caused by the error is unrelated to an outcome on the merits, tethering the showing of prejudice to such an outcome misplaces the measure, at the expense of the rights the law in question was designed to protect.” (*K.H., supra*, 84 Cal.App.5th at p. 609, italics omitted.)

As we explained in *K.H.*, “ ‘ICWA compliance presents a unique situation ....’ ” (*K.H., supra*, 84 Cal.App.5th at p. 608.) “ICWA is not directed at reaching, or protecting, a specific outcome on the merits.” (*Id.* at p. 609.) Rather, “ ‘[t]he purpose of ICWA and related California statutes is to provide notice to the tribe sufficient to allow it to determine whether the child is an Indian child, and whether the tribe wishes to intervene in the proceedings’ [citation], and an adequate initial inquiry facilitates the

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<sup>4</sup> *People v. Watson* (1956) 46 Cal.2d 818, 820.



information gathering upon which the court's ICWA determination will rest.” (*Id.* at p. 608.) Yet, “while the appealing party is usually a parent, parents do not bear the burden of gathering information in compliance with ICWA [citations], and parents may raise the claim of error for the first time on appeal.” (*Ibid.*) Further, the ultimate determination whether a child is an Indian child rests with the tribe, not with a parent, the agency, or the juvenile court. (*Id.* at p. 596.)

“[I]f the inquiry is inadequate at the outset, the likelihood that the opportunity to gather relevant information will present itself later in the proceeding declines precipitously.” (*K.H., supra*, 84 Cal.App.5th at p. 609.) Thus, “the relevant injury under ICWA is not tied to whether the appealing parent can demonstrate to the juvenile court or a reviewing court a likelihood of success on the merits of whether a child is an Indian child[, under a standard *Watson* analysis]. The relevant rights under ICWA belong to Indian tribes and they have a statutory right to receive notice where an Indian child may be involved so that they may make that determination. It necessarily follows that [in the context of ICWA and consistent with *In re A.R.*,] the prejudice to those rights lies in the failure to gather and record the very information the juvenile court needs to ensure accuracy in determining whether further inquiry or notice is required, and whether ICWA does or does not apply. Many cases do not proceed beyond the inquiry at the first stage in the compliance process and, therefore, ensuring adequacy and accuracy at this step is critical if the rights of tribes under ICWA and California law are to be meaningfully safeguarded, as was intended by Congress and our state Legislature.” (*K.H.*, at p. 591.)

As we explained in *K.H.*, “where the opportunity to gather the relevant information critical to determining whether the child is or may be an Indian child is lost because there has not been adequate inquiry and due diligence, reversal for correction is generally the only effective safeguard.” (*K.H., supra*, 84 Cal.App.5th at p. 610.) Here, the department's inquiry “fell well short of that required to gather the information needed to meaningfully safeguard the rights of the tribes, as intended under ICWA and California law.” (*Id.* at p. 620.) “Where a record is silent or nearly silent with respect to an ICWA

inquiry at the first step, a finding of harmlessness necessarily rests on speculation” and “is at odds with the statutory protections that ICWA and California law intend to afford Indian children and Indian tribes.” (*Id.* at p. 611.) Therefore, the error is prejudicial.

### **DISPOSITION**

The juvenile court’s finding that ICWA does not apply is conditionally reversed, and the matter is remanded to the juvenile court with directions to order the department to comply with the inquiry and documentation provisions set forth in section 224.2, subdivisions (b) and (e), and rule 5.481(a)(5). If, after determining that an adequate inquiry was made consistent with the reasoning in this opinion, the court finds that ICWA applies, the court shall proceed in compliance with ICWA and related California law. If the court instead finds that ICWA does not apply, the court shall reinstate its ICWA finding. In all other respects, the court’s order terminating mother and father’s parental rights is affirmed.